


1-15-1987

## Fear and Loathing on the California Coastline: Are Coastal Commission Property Exactions Constitutional?

Mitchell F. Disney

Follow this and additional works at: <http://digitalcommons.pepperdine.edu/plr>

 Part of the [Government Contracts Commons](#), [Land Use Planning Commons](#), [Natural Resources Law Commons](#), and the [Property Law and Real Estate Commons](#)

---

### Recommended Citation

Mitchell F. Disney *Fear and Loathing on the California Coastline: Are Coastal Commission Property Exactions Constitutional?*, 14 Pepp. L. Rev. 2 (1987)  
Available at: <http://digitalcommons.pepperdine.edu/plr/vol14/iss2/4>

This Comment is brought to you for free and open access by the School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized administrator of Pepperdine Digital Commons. For more information, please contact [Kevin.Miller3@pepperdine.edu](mailto:Kevin.Miller3@pepperdine.edu).

## **Fear and Loathing on the California Coastline: Are Coastal Commission Property Exactions Constitutional?**

### **I. INTRODUCTION**

Many California shoreline residents have heard horror stories about the California Coastal Commission. One such horror story was realized by a certain Malibu Beach entrepreneur. This individual, seeking to acquire a permit to construct a wall which would alter the interior floor plan of his fire-gutted restaurant, was given permission to perform the construction—conditioned, however, on his granting an easement to the State of California for lateral public access<sup>1</sup> across his private beach. Dismayed, and unwilling to expend the time, money, and energy to battle the Commission,<sup>2</sup> the entrepreneur opted to sell the property rather than be forced to give up his private beach.

This scenario is not the only one of its kind. In 1985 alone, the California Coastal Commission secured 112 such uncompensated beach access exactions<sup>3</sup> through dedication or deed restriction imposed upon landowners seeking to build on their property.<sup>4</sup> Since 1972, the

---

1. Lateral access is access along the shoreline. Vertical access is access to the shoreline. This comment focuses on the constitutionality of the exaction of easements which provide lateral access along the coastline.

2. Normally, reconstruction of a fire damaged structure is exempted from the permit requirement. CAL. PUB. RES. CODE § 30610(g) (West 1986). In spite of this clear statutory mandate, the Commission refused to exercise its discretion to grant the exemption in this case. Since the Coastal Commission is an administrative body of the state government, the "disappointed complainant" is faced with the additional burden of first "exhaust[ing] his administrative remedies" before judicial review may be obtained. 7 P. ROHAN, ZONING AND LAND USE CONTROLS § 52.03(1), at 52-16 (1986). The disappointed complainant described in this article is a personal acquaintance of the author.

3. An "exaction" is a condition imposed by the government upon one seeking to develop real property. Exactions for such improvements and facilities as streets, sidewalks, sewers, and parks are common. See Jacobsen & McHenry, *Exactions on Development Permission*, in WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION 342 (D. Hagman & D. Misczynski eds. 1978).

4. CALIFORNIA COASTAL COMM'N, COASTAL ACCESS PROGRAM SIXTH ANNUAL REPORT 4 (1986) (available by writing the California Coastal Commission, 631 Howard St., 4th Floor, San Francisco, CA 94105; additional information is available from the Assistant Deputy Director for Access and Coastal Resource Information Programs, at (415) 543-8555).

Commission has reportedly imposed more than 1800 of these dedication requirements upon California landowners.<sup>5</sup>

## II. THE CALIFORNIA COASTAL ACT—PARENT OF THE COASTAL COMMISSION

The California Coastal Act of 1976<sup>6</sup> is the legislatively enacted successor to the California Coastal Zone Act,<sup>7</sup> which was promulgated by referendum in 1972. The Coastal Act granted to the Commission broad powers to police the "coastal zone"<sup>8</sup> established by the Act. It was intended to "[p]rotect, maintain, . . . enhance and restore the overall quality of the coastal zone environment and . . . resources . . . , [to] [a]ssure orderly, balanced utilization of . . . [those] resources [and to] [m]aximize public access . . . [a]nd recreational opportunities . . . ."<sup>9</sup> In order to carry out these purposes, regional or local commissions, along with a central "Coastal Commission," were established and authorized to oversee the enforcement of the Act's provisions.<sup>10</sup>

Among the powers conferred on the Commission and its counterparts is that of granting or denying "coastal development permits" for "new development projects" within the coastal zone.<sup>11</sup> In addition, the Commission may subject issuance of these permits "to reasonable terms and conditions" to ensure that the new development conforms to the policies and goals of the Coastal Act.<sup>12</sup> Terms and conditions commonly attached to permit approval by the Commission include requirements that the landowner dedicate a portion of his

---

5. CALIFORNIA COASTAL COMM'N, COASTAL ACCESS PROGRAM FIFTH ANNUAL REPORT 8 (1985).

6. CAL. PUB. RES. CODE §§ 30000-30950 (West 1986 & Supp. 1987).

7. Former CAL. PUB. RES. CODE §§ 27000-27650 (repealed in 1977).

8. The coastal zone includes all the "land and water area of the State of California from the Oregon border to the border of the Republic of Mexico . . . and extending inland generally 1,000 yards from the mean high tide line of the sea." CAL. PUB. RES. CODE § 30103(a) (West 1986 & Supp. 1987).

9. *Id.* § 30001.5.

10. *See generally id.* §§ 30300-30305.

11. *Id.* § 30600. "New development projects" include any development not mentioned in section 30212(b). Excluded from the Commission's purview by section 30212 are acts involving: (1) replacement of any structure, other than a public works facility, which does not exceed by more than 10 percent the floor area, height, or bulk of the destroyed structure and sited in the same location as the destroyed structure; (2) demolition or reconstruction of a single-family residence which does not increase by more than 10 percent the floor area, height or bulk of the former structure and which is located in the same location as the former structure; (3) remodeling or improvement of a structure which does not block or impede public access, change the intensity of its use, or increase by more than 10 percent the floor area, height and bulk of the structure; (4) reconstruction or repair of any seawall not seaward of the pre-existing one; and (5) any repair and maintenance activity which requires a coastal development permit pursuant to section 30610, unless the Commissions find that such activity will have an adverse impact on lateral public access along the beach. *Id.* § 30212.

12. *Id.* § 30607.

property to the State of California for public access across the landowner's privately owned uplands.<sup>13</sup> Often, scenic easement conditions are also imposed.<sup>14</sup>

Although the Commission has been challenged on various grounds,<sup>15</sup> its scope of authority has been challenged perhaps most often on the basis of its power to subject permit authorizations to public access and aesthetically based conditions. This comment will discuss the extent of the California Coastal Commission's authority under the United States Constitution to impose public access and aesthetic conditions upon the granting of permits for new development within the coastal zone. In particular, the imposition of these conditions upon *individual landowners*, as opposed to commercial subdividers, will be the focus of this inquiry.

The validity of the Commission's exactions will be analyzed in two steps, in accordance with the approach adopted by the United States Supreme Court in a recent decision, *Loretto v. Teleprompter Manhattan CATV Corp.*:<sup>16</sup> first, whether these exactions are valid under the police power of the State of California;<sup>17</sup> and second, whether such exactions constitute a taking of private property for public use under the doctrine of *Penn Central Transportation Co. v. New York*,<sup>18</sup> for which the Constitution requires that the government pay just compensation.<sup>19</sup>

It will be concluded that California Coastal Commission public access exactions, while valid under the police power in some circumstances, are invalid in cases where exactions are required of

13. See, e.g., *Liberty v. California Coastal Comm'n*, 113 Cal. App. 3d 491, 170 Cal. Rptr. 247 (1980). In California, the mean high tide line separates the tidelands from the uplands. See 1 WATERS AND WATER RIGHTS § 36.3(c) (R. Clark ed. 1967). Tidelands are lands lying between the mean high and mean low tide lines, while uplands includes the areas lying landward. *Marks v. Whitney*, 6 Cal. 3d 251, 491 P.2d 374, 98 Cal. Rptr. 790 (1971).

14. See, e.g., *Sea Ranch Ass'n v. California Coastal Comm'n*, 527 F. Supp. 390 (N.D. Cal.), *vacated*, 454 U.S. 1071 (1981).

15. See *CEEED v. California Coastal Zone Comm'n*, 43 Cal. App. 3d 306, 118 Cal. Rptr. 315 (1974). In *CEEED*, the Coastal Commission's predecessor, the "Coastal Zone Commission," was challenged for: (1) infringement of the fundamental right to travel; (2) denial of due process of laws; (3) exercise of unlawfully designated legislative power; and (4) invalid state intrusion into municipal affairs of chartered cities. The California Court of Appeals upheld the Commission's authority on every charge. *Id.* at 333, 118 Cal. Rptr. at 334.

16. 458 U.S. 419 (1982).

17. See *infra* notes 20-78 and accompanying text.

18. 438 U.S. 104 (1977), *reh'g denied*, 439 U.S. 883 (1978).

19. See *infra* notes 79-135 and accompanying text.

landowners who do not intend to subdivide their land. Applying the *Penn Central* test of constitutionality, the Commission's beach easement exactions will be shown as unconstitutional in all applications, since a taking is present and the aggrieved landowners do not receive just compensation. Finally, it will be suggested that the economic burden of providing public access to California's coastal zone should rightfully be placed upon the general taxpaying public, rather than on individual beach-front property owners.

### III. VALIDITY OF EXACTIONS UNDER THE POLICE POWER OF THE STATE OF CALIFORNIA

States and municipalities have constitutional authority under the police power to enact laws regulating land use so long as such enactments serve to advance the public health, safety, morals, or general welfare.<sup>20</sup> In addition, the state regulation must be reasonable and not arbitrary.<sup>21</sup> The eminent domain power of a state is distinguishable from its general police power, since eminent domain involves a taking of property for which just compensation must be paid.<sup>22</sup> Although the police power inheres in the state, it may be delegated by legislative action to subordinate governmental bodies.<sup>23</sup> In this manner, the California legislature has delegated its police power to the California Coastal Commission with regard to planning and management in the coastal zone.<sup>24</sup>

#### A. *Validity of Imposition of Aesthetic Conditions Under the Police Power*

The authority of the California Coastal Commission to condition the granting of new development permits on aesthetic considerations<sup>25</sup> has been challenged on the basis that the conditioning of such permits solely upon aesthetic considerations constitutes an arbitrary

---

20. See 5 P. ROHAN, *supra* note 2, § 35.06(1), at 35-40.

21. "[T]he police power is the power of the sovereign to legislate in behalf of the public health, morals or safety by general regulations reasonably adapted to the end in view and not creating any arbitrary discrimination between different classes of men or things." 1 NICHOLS, *THE LAW OF EMINENT DOMAIN* § 1.42, at 1-134 (J. Sackman ed. 1984).

22. See D. HAGMAN, *URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW* § 173 (1971).

23. See *id.*

24. Section 30214 of the Public Resources Code provides that "[t]he commission . . . shall have the primary responsibility for the implementation of the provisions of [the Coastal Act] and is designated as the state coastal zone planning and management agency for any and all purposes . . . ." CAL. PUB. RES. CODE § 30330 (West 1986).

25. Section 30214(a)(4) of the Public Resources Code states that the Coastal Act was intended to accomplish the "protection of aesthetic values" of the coastal zone. *Id.* § 30214(a)(4). Section 30215 mandates the protection of "scenic and visual qualities of coastal areas . . . ." *Id.* § 30215.

and unreasonable exercise of the police power.<sup>26</sup> Like other land use regulations, to constitute a valid exercise of the police power, aesthetic conditions imposed upon new development projects must advance the public health, safety, morals, or general welfare and must not be arbitrary.<sup>27</sup> Prior to 1925, the "general welfare" aspect of the police power had not been widely recognized.<sup>28</sup> Cases decided in the early part of this century involving land use regulations show judicial hostility toward aesthetic considerations where they constituted the sole basis for an exercise of the police power by a state.<sup>29</sup>

The 1926 United States Supreme Court in *Village of Euclid v. Ambler Realty Co.*<sup>30</sup> approved "general welfare" as a viable factor to be considered in determining the validity of state exercises of the police power.<sup>31</sup> *Euclid* is thus said to have provided the basis upon which aesthetic considerations have since been grounded.<sup>32</sup>

Despite the foothold provided by *Euclid*, the legitimacy of aesthetic considerations relating to land use was an open issue for the next several years.<sup>33</sup> Most courts continued to insist that aesthetic concerns could not provide the sole basis for aesthetically based land use regulations.<sup>34</sup>

Further legitimization of aesthetic concerns as a basis for state land use regulation resulted from the 1954 Supreme Court decision in

26. See, e.g., *Bel Mar Estates v. California Coastal Comm'n*, 115 Cal. App. 3d 936, 171 Cal. Rptr. 773 (1981) (landowner's proposed development permit was denied in order to preserve the aesthetic characteristics of a scenic canyon and the surrounding natural vegetation).

27. See 3 P. ROHAN, *supra* note 2, § 16.01, at 16-2 to 16-3.

28. See, e.g., Comment, *The Aesthetic Factor in Zoning*, 11 DUQ. L. REV. 204, 209 (1972).

29. See, e.g., *City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co.*, 72 N.J.L. 285, 287, 62 A. 267, 268 (1905):

No case has been cited, nor are we aware of any case which holds that a man may be deprived of his property because his tastes are not those of his neighbors. Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation.

30. 272 U.S. 365 (1926).

31. "To the phrase, 'public health, safety, and morals,' was added 'general welfare,' even though this term had been sporadically implemented by the courts prior to the *Euclid* decision." Comment, *supra* note 28, at 209.

32. "The concept of the general welfare has been enlarged gradually to include many new considerations. Such terms as *public convenience, comfort, and prosperity* become linked with the general welfare." Agnor, *Beauty Begins a Comeback: Aesthetic Considerations in Zoning*, 11 J. PUB. L. 260, 264 (1962) (emphasis in original). From this point, it was only a short step toward finding support for aesthetic considerations.

33. See 3 P. ROHAN, *supra* note 2, § 16.01, at 16-20.

34. See *id.* at 16-21.

*Berman v. Parker*.<sup>35</sup> Although *Berman* involved eminent domain, and not police power, it has been widely cited in cases which address the issue of state police power and aesthetics.<sup>36</sup> The language used by the Court was broad and inclusive:

The values it [the redevelopment plan involved in the case] represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.<sup>37</sup>

Despite the Court's apparent approval of the involvement of aesthetic considerations in property regulation in *Berman*, change in the judicial outlook among the states has been slow. Throughout the 1970's, most jurisdictions remained insistent that, in order to fall within the scope of the police power, land use regulations be based primarily on some other well-recognized grounds, such as economic considerations.<sup>38</sup>

By 1980, however, the tide had turned. It can now be said that a majority of jurisdictions have adopted the position that aesthetic factors alone may support a state's exercise of the police power.<sup>39</sup> According to Professor Rohan, only eleven jurisdictions now expressly disapprove of regulations which are based solely upon aesthetic factors.<sup>40</sup>

The United States Supreme Court lent approval to aesthetic considerations in land use regulations in the 1980 decision of *Metromedia, Inc. v. City of San Diego*.<sup>41</sup> A law banning certain billboards, partly on the basis of aesthetics, was being challenged as violative of the first amendment. Addressing the "city's interest in

---

35. 348 U.S. 26 (1954).

36. See, e.g., *Metromedia, Inc. v. City of San Diego*, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980), rev'd, 453 U.S. 490 (1981) (on first amendment grounds). The California Supreme Court referred to *Berman* as follows:

Most jurisdictions now concur with the broad declaration of Justice Douglas in *Berman v. Parker* . . . . Although Justice Douglas tendered this description in a case upholding the exercise of the power of eminent domain for community redevelopment, it has since been recognized as a correct description of the authority of a state or city to enact legislation under the police power.

*Id.* at 861, 610 P.2d at 413, 164 Cal. Rptr. at 516 (citations omitted).

37. *Berman*, 348 U.S. at 33.

38. See generally Note, *Zoning—General Welfare Includes Consideration of Aesthetic and Property Values*, 78 DICK. L. REV. 605 (1974).

39. See 3 P. ROHAN, *supra* note 2, § 16.01, at 16-25. See also Bufford, *Beyond the Eye of the Beholder: A New Majority of Jurisdictions Authorize Aesthetic Regulation*, 48 UMKC L. REV. 125 (1980). But see Rowlett, *Aesthetic Regulation Under the Police Power: The New General Welfare and the Presumption of Constitutionality*, 34 VAND. L. REV. 603, 605 n.16 (1981) ("Because of the difficulties of interpreting some of the aesthetic regulation cases, some room exists for disagreement concerning whether certain jurisdictions follow the majority or minority rule.").

40. 3 P. ROHAN, *supra* note 2, § 16.01, at 16-25 to 16-26 n.56.

41. 453 U.S. 490 (1981) (plurality opinion), rev'g 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980).

traffic safety and aesthetics," Justice White, speaking for the plurality, stated, "[W]e cannot conclude that the city has drawn an ordinance [which] fails directly to advance substantial government interests."<sup>42</sup> Thus, the plurality implied that aesthetics, at least when combined with traffic safety, would be a valid basis for the exercise of police power.

In a concurring opinion, Justice Brennan recognized the validity of aesthetic considerations. Nevertheless, he regarded the city's failure to prove a *substantial* interest in aesthetics as fatal to the ordinance in the case under review, due to the presence of first amendment infringements.<sup>43</sup>

Three of the Justices wrote dissenting opinions, but were in favor of the exercise of police power to promote aesthetic concerns. Chief Justice Burger remarked that the Court should defer to decisions of the legislature to base regulations on aesthetic concerns, absent the involvement of any regulation of speech.<sup>44</sup> Justice Rehnquist, in a bold dissent, forthrightly stated that the aesthetic considerations involved in the case could by themselves support the validity of the ordinance.<sup>45</sup> Likewise, Justice Stevens recognized the validity of the city's aesthetic concerns.<sup>46</sup>

In sum, the Justices appear to support those states which consider aesthetic concerns to be an ample basis for state exercise of police power. Thus, decisions of California courts which uphold the imposition of aesthetic conditions upon new development would appear to be in accord with the beliefs of a majority of the Justices now on the Supreme Court. If the Court were squarely faced with the issue, it seems predictable that it would find aesthetic concerns to be a valid basis for state action.

---

42. *Id.* at 512 (plurality opinion). The city's anti-billboard ordinance was nevertheless struck down by a finding that the state concern was outweighed by a significant first amendment violation. *Id.* at 521 (plurality opinion).

43. "I do not doubt that '[i]t is within the power of the [city] to determine that the community should be beautiful,' but that power may not be exercised in contravention of the First Amendment." *Id.* at 530 (citation omitted) (quoting *Berman v. Parker*, 348 U.S. 26, 33 (1954)) (Brennan, J., concurring in judgment).

44. *Id.* at 561 (Burger, C.J., dissenting).

45. Also citing *Berman v. Parker*, Justice Rehnquist stated, "In my view, the aesthetic justification alone is sufficient to sustain a total prohibition of billboards within a community . . . ." *Id.* at 570 (Rehnquist, J., dissenting).

46. "I believe a community has the right to decide that its interests in . . . securing beautiful surroundings outweigh the countervailing interests in uninhibited expression by means of words and pictures in public places." *Id.* at 550 (Stevens, J., dissenting in part).



*B. Validity of Coastal Commission Exactions from Landowners  
Where Subdivision of Property is not Involved*

1. Comparison: Cases Involving the Subdivision of Land

Coastal Commission exactions of land for public beach access, in which the landowner receives no compensation, typically arise in cases in which the beach-homeowner is not subdividing, but only seeking to improve or repair his property. However, there are significant policy distinctions between that fact pattern and the cases in which a builder seeks to subdivide land for development. Exactions of private property from developers wishing to subdivide have traditionally been recognized as validly falling within the state's police power.<sup>47</sup>

The justifications commonly offered in support of state authorization to attach such conditions to new development permits are as follows:

- (1) Subdivision results in an increased demand for public services, which are more fairly paid by the subdivider than by the government, since he is able to pass the cost of the exaction to the new inhabitants of the subdivision;<sup>48</sup>
- (2) Subdivision is viewed as a privilege extended by the state;<sup>49</sup> and
- (3) The subdivider obtains an overall economic benefit through the privilege of a development permit.<sup>50</sup>

It is, therefore, considered to be a reasonable exercise of police power for a developer to be required to dedicate a parcel of a subdivision to the state which will in turn be used in providing benefits to the public.

Where the subdivision of land is involved, the attachment of public access conditions to the granting of permission to undertake new de-

---

47. "With rare exceptions, subdivision statutes authorize . . . dedication of land for [public welfare purposes] as a condition for subdivision approval." D. HAGMAN, *supra* note 22, at 138. *See also* CAL. GOV'T CODE § 66477 (West Supp. 1987) (stating that "the legislative body of a city or county may, by ordinance, require the dedication of land . . . for park or recreational purposes as a condition to the approval of a [land development project] . . ."). However, this law also imposes a reasonableness standard on land dedications required for approval. *See id.* § 66477(e).

48. *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 137 N.W.2d 442, (1965), *appeal dismissed*, 385 U.S. 4 (1966). The court recognized that "the municipality may require [the subdividing party] to dedicate part of his platted land to meet a demand to which the municipality would not have been put but for the influx of people into the community to occupy the subdivision lots." *Id.* at 620, 137 N.W.2d at 448.

49. *See generally* 7 P. ROHAN, *supra* note 2, § 45.04(1), at 45-92.

50. "The municipality by approval of a proposed subdivision plat enables the subdivider to profit financially by selling the subdivision lots as home-building sites and thus realizing a greater price than could have been obtained if he had sold his property as unplatted lands." *Jordan*, 28 Wis. 2d at 620, 137 N.W.2d at 448.

velopment within the coastal zone constitutes a permissible exercise of police power of the State of California; the power of eminent domain need not be invoked.<sup>51</sup> A public purpose is clear and evident, since public access to the tidelands is an important concern of the state.<sup>52</sup> Moreover, the applicability of the above-mentioned justifications in cases involving the subdivision of land provides a plausible rationale for the proposition that the regulation is reasonable and not arbitrary.

The California courts have tended to ignore the distinctions between a subdivider developing a tract of land and a landowner seeking to improve a single parcel. Where the subdivision of land is not involved, the Coastal Commission has been improperly permitted to attach public access conditions to permits to construct new developments in the coastal zone.

## 2. Cases Not Involving Subdivision of Land

While Professor Nichols<sup>53</sup> and courts in other states<sup>54</sup> have recognized the difference between requiring exactions from subdividers as opposed to single parcel landowners, California courts continue to apply the exaction principle to cases not involving the subdivision of

---

51. See *supra* notes 47-50 and accompanying text.

52. "The public need for access to state beaches on foot or visually and the importance the people of California place on that need have been embodied in the California Coastal Zone Conservation Act." *Sea Ranch Ass'n v. California Coastal Comm'n*, 527 F. Supp. 390, 395 (N.D. Cal.), *vacated*, 454 U.S. 1070 (1981).

53. "[T]he developers of new subdivisions may be required by a municipality to provide facilities such as roads, streets, sewers, and playgrounds as a condition to approval of a plat." 1 NICHOLS, *supra* note 21, § 1.42[2], at 1-169. "The foregoing would not, however, apply to the building of a single structure which is not part of a subdivision." *Id.* at 1-190.

54. See, e.g., *Board of Supervisors of James City County v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975). The court acknowledged that it dealt not "with the creation of a subdivision but with development of individually-owned parcels of land," and considered the issue to be "whether [the government] has the power to . . . require[ ] individual landowners, as a condition to the right to develop their parcels, to dedicate [land] for the purpose of providing a public road . . . [.] the need for which . . . [was] substantially generated by public traffic demands rather than by the proposed development." *Id.* at 138, 216 S.E.2d at 208. See also *Battaglia v. Wayne Township Planning Bd.*, 98 N.J. Super. 194, 236 A.2d 608 (1967), which states:

The purposes and justification for imposing conditions upon the subdivider are not present in the case of a landowner who . . . applies for a permit to build a single building. Unlike the case of a land subdivision, no new streets are necessitated by plaintiff's planned use; there are no purchasers [of the subdivided lots] to whom the cost of improvements can be passed, and plaintiff's land receives no discernable benefit from compliance with the imposed conditions.

*Id.* at 199-200, 236 A.2d at 611-12 (emphasis added).

property. For example, the court in *Nollan v. California Coastal Commission*<sup>55</sup> dealt with the validity of the Commission's imposition of a public access dedication condition upon a private landowner seeking to rebuild his single-family home on an undivided single lot. The court of appeals upheld the condition, completely disregarding the fact that the rationale which supports public purpose exactions had no bearing on the facts of the case.

The exaction attached to the landowners' request to build in *Nollan* was improper. The planned construction would not have resulted in an increase in local population, the privilege of subdivision was not involved, and any profits likely to have resulted would have been small by comparison to those reaped where the subdivision of land into multiple parcels for public sale is involved.

In *Whaler's Village Club v. California Coastal Commission*,<sup>56</sup> a California court in like manner applied the subdivision exaction principle despite its inapplicability to the facts of the case. Although the apartment complex in the case may have required a subdivision of property at some time in the past, the development for which the owners sought a permit involved neither the "privilege" of subdivision, nor did it increase the local population. Furthermore, in no way could it be said that improvement to the apartment complex provided the kind of economic benefits enjoyed by a developer who subdivides his property and then sells it to the public. Instead, the landowners in *Whaler's Village* were simply trying to retain the value of their property by constructing a rock revetment to shield it from destruction by the surf.<sup>57</sup>

The *Whaler's Village* court went so far as to state that, "*as a general proposition*, the Commission may constitutionally require uncompensated access dedication as a condition of approving coastal development."<sup>58</sup> This remark illustrates the court's failure to distinguish the subdivision cases, in which the subdivider reaps an overall economic benefit, from the beach easement exactions of the Coastal Commission, in which the single-parcel landowner may only be seeking to protect or maintain the value of his property.

The presence of a valid state interest is only the first prong of the test for the validity of the exercise of police power. The second prong—that of reasonableness—is unfulfilled in cases where easements are exacted from individuals not subdividing their property. Thus, the State of California acts in excess of its police power when it

---

55. 177 Cal. App. 3d 719, 223 Cal. Rptr. 28, *prob. juris. noted*, 107 S. Ct. 312, *dismissal denied*, 107 S. Ct. 665 (1986).

56. 173 Cal. App. 3d 240, 220 Cal. Rptr. 2 (1985), *cert. denied*, 106 S. Ct. 1962 (1986) (the appeal was denied for want of jurisdiction).

57. *See id.*

58. *Id.* at 256, 220 Cal. Rptr. at 11 (emphasis added).

exacts public access easements from nonsubdividing landowners without compensating them. California should instead be required to use its power of eminent domain<sup>59</sup> in making any such exactions, and pay the aggrieved landowners just compensation.<sup>60</sup>

C. *Validity of Exactions Where No Direct Relationship Exists Between the Exaction and the Intended Development*

In the recent case of *Nollan v. California Coastal Commission*,<sup>61</sup> the California Court of Appeal applied an "indirect nexus" test to determine the validity of beach access exactions by the Commission. The court held that only an indirect relationship between the exaction imposed and the public need to which the new development project contributed is required in order for an exaction condition to validly fall within the state's police power.<sup>62</sup>

The seminal case for what is termed the "indirect nexus" or "indirect relationship" test is *Associated Home Builders, Inc. v. City of Walnut Creek*,<sup>63</sup> decided in 1971. Since then, the rule has been repeatedly applied in Commission exaction cases to validate exactions from landowners. Such exactions have been upheld even where the specific proposed development could in no way be said to be responsible for creating or increasing the need for public access to the tidelands.<sup>64</sup> The reasoning for allowing such exactions is that, although the individual development does not create the need for public access, an exaction is permissible "if its effect together with the cumulative impact of similar projects would in the future create or increase the need for a system of such compensating accessways."<sup>65</sup>

California courts have justified these exactions by noting that state police power actions have traditionally been tested for validity under

---

59. "Exercise of the power of eminent domain is proper only for a public use and only when use of the extraordinary power of eminent domain is necessary." D. HAGMAN, *supra* note 22, § 174.

60. See *supra* note 22 and accompanying text.

61. 177 Cal. App. 3d 719, 223 Cal. Rptr. 28, *prob. juris. noted*, 107 S. Ct. 312, *dismissal denied*, 107 S. Ct. 665 (1986).

62. *Id.* at 723, 223 Cal. Rptr. at 30.

63. 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971). See also *Ayres v. City of Los Angeles*, 34 Cal. 2d 31, 207 P.2d 1 (1949). The *Associated Home Builders* court began its analysis with a discussion of *Ayres*. *Associated Home Builders*, 4 Cal. 3d at 638, 484 P.2d at 610, 94 Cal. Rptr. at 634.

64. See, e.g., *Nollan*, 177 Cal. App. 3d at 723, 223 Cal. Rptr. at 30.

65. *Remmenga v. California Coastal Comm'n*, 163 Cal. App. 3d 623, 628, 209 Cal. Rptr. 628, 631, *appeal dismissed*, 106 S. Ct. 241, *reh'g denied*, 106 S. Ct. 584 (1985).

the fourteenth amendment due process clause<sup>66</sup> by applying a "rational basis" test.<sup>67</sup> Under this test, if the "legislation [has] a rational relationship to a legitimate end of government,"<sup>68</sup> the legislation will be upheld. Rationality is presumed, since "courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws," and, accordingly, the exactions by the Commission should be left alone.<sup>69</sup>

The indirect nexus rule has been followed by a small number of states besides California.<sup>70</sup> However, most jurisdictions passing on the issue of the validity of governmentally imposed exactions for the public benefit have shunned the liberal *Associated Home Builders* rule of California. Instead, the decisions demonstrate a preference for a test which requires the showing of a direct nexus between the exaction imposed and the particular public needs generated by the landowner's proposed development.<sup>71</sup>

California's indirect nexus rule has been criticized as "allow[ing] local governments almost unlimited discretion in the imposition of dedication requirements."<sup>72</sup> The rule is especially unjust when applied to an individual landowner developing a single lot.<sup>73</sup> A Florida

---

66. U.S. CONST. amend. XIV, § 1.

67. See, e.g., *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926) (applying "rational basis" test to governmental regulation of real property).

68. J. NOWAK, R. ROTUNDA & J. YOUNG, *CONSTITUTIONAL LAW* 443 (2d ed. 1983) [hereinafter J. NOWAK].

69. *Remmenga*, 163 Cal. App. 3d at 629, 209 Cal. Rptr. at 632 (citing *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963)).

70. See, e.g., *Collis v. City of Bloomington*, 310 Minn. 5, 246 N.W.2d 19 (1976); *Home Builders Ass'n v. City of Kansas City*, 555 S.W.2d 832 (Mo. 1977); *Call v. City of W. Jordan*, 606 P.2d 217 (Utah 1979); *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 137 N.W.2d 442 (1966).

71. See, e.g., *Aunt Hack Ridge Estates, Inc. v. Planning Comm'n*, 160 Conn. 109, 273 A.2d 880 (1970); *Pioneer Trust & Sav. Bank v. Village of Mount Prospect*, 22 Ill. 2d 375, 176 N.E.2d 799 (1961); *Schwing v. City of Baton Rouge*, 249 So. 2d 304 (La. 1971); *Howard County v. JJM, Inc.*, 301 Md. 256, 482 A.2d 908 (1984); *Billings Properties, Inc. v. Yellowstone County*, 144 Mont. 25, 394 P.2d 182 (1964); *Simpson v. City of North Platte*, 206 Neb. 240, 292 N.W.2d 297 (1980); *Land/Vest Properties, Inc. v. Town of Plainfield*, 117 N.H. 817, 379 A.2d 200 (1977); *Longridge Builders, Inc. v. Planning Bd. of Princeton Township*, 52 N.J. 348, 245 A.2d 336 (1968); *McKain v. Toledo City Planning Comm'n*, 26 Ohio App. 2d 171, 270 N.E.2d 370 (1971); *Gary D. Reihart, Inc. v. Township of Carroll*, 487 Pa. 461, 409 A.2d 1167 (1979); *Frank Asuni, Inc. v. City of Cranston*, 407 R.I. 63, 264 A.2d 910 (1970); *City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802 (Tex. 1984). Cf. *Wald Corp. v. Metropolitan Dade County*, 338 So. 2d 863 (Fla. App. 1976) (termed its rule the "rational nexus" test; rejected rule requiring proof by the government that the exaction is "specifically and uniquely attributable" to the needs created by the new development, and avoided the California approach as too liberal). See also MODEL LAND DEV. CODE § 2-103 (1976); 2 P. ROHAN, *supra* note 2, § 9.01[2].

72. *Wald Corp. v. Metropolitan Dade County*, 338 So. 2d 863, 866 (Fla. Dist. Ct. App. 1976).

73. See *supra* notes 47-60 and accompanying text.

district court of appeal, in abandoning the California indirect nexus rule, remarked as follows:

[W]hile such wide latitude is routinely accorded in other areas of police power regulation, required dedication as a condition for approval for subdivision plats stands in derogation of constitutionally protected property rights. Thus, it is imperative that some sort of standard be imposed which will not allow virtually unbridled interference with private property.<sup>74</sup>

Thus, most other states have recognized the potential dangers of allowing such wide discretion to state lawmakers. Numerous California coastal residents would undoubtedly argue that these concerns have come to fruition in their home state. Nevertheless, the California rule is supported by the long standing test of police power validity: namely, that so long as "the validity of the legislative classification . . . be fairly debatable[,] the legislative judgment must be allowed to control."<sup>75</sup> This rational basis test is almost always passed by the legislation in question.<sup>76</sup>

Notwithstanding this, California's rule requiring no direct nexus between the conditions imposed and any burdens created by the new development may be considered patently arbitrary where subdivision is not involved. Commission exactions from individual beach property owners should therefore be found unconstitutional.<sup>77</sup> Nevertheless, even if the general validity of an exercise of state police power is upheld, a resultant interference with private property rights is still subject to separate analysis under the taking clause of the fifth and fourteenth amendments to the United States Constitution.<sup>78</sup>

#### IV. VALIDITY OF COASTAL COMMISSION PUBLIC ACCESS EXACTIONS UNDER THE TAKING CLAUSE OF THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION

The fifth amendment to the United States Constitution has become the basis of numerous challenges to the Coastal Commission's authority to require public access dedications as a condition to granting

---

74. *Wald*, 338 So. 2d at 866.

75. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926).

76. J. NOWAK, *supra* note 68, at 449-50.

77. Justice Rehnquist's dissent in *Penn Central* acknowledges that "when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured . . ." *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 148 n.11 (1977) (Rehnquist, J., dissenting) (citing *Nashville, Chattanooga & St. Louis Ry. v. Walters*, 294 U.S. 405, 429-30 (1935)).

78. *See infra* notes 81-88 and accompanying text.

new development permits.<sup>79</sup> The fifth amendment states in pertinent part that no person shall "be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."<sup>80</sup>

While a land use regulation may be valid under the police power of a state, it may still constitute a taking of private property for public use for which the fifth amendment requires that just compensation be paid. In *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>81</sup> the United States Supreme Court indicated that a two-step analysis must be applied to determine whether a particular regulation is constitutional. The Court stated:

The Court of Appeals determined that § 828 serves . . . legitimate public purpose[s] . . . and thus is within the State's police power. We have no reason to question that determination. *It is a separate question*, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid.<sup>82</sup>

Thus, state interference with land use will be found improper if the action can either be characterized as one which, due to arbitrariness or lack of public purpose, exceeds the scope of the police power. State interference is also improper if the regulation effects a taking of the private property without paying just compensation.<sup>83</sup> The United States Supreme Court introduced a comprehensive test for determining when a government act affecting private property may be deemed a taking in *Penn Central Transportation Co. v. New York*.<sup>84</sup> Although the Court acknowledged that its approach was essentially "ad hoc" in nature,<sup>85</sup> it identified several factors to be used in determining how to classify the government's action.

Among the factors offered by the Court were: (1) "[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations . . .";<sup>86</sup> (2) "the character of the governmental action";<sup>87</sup> and (3) whether the "government action [ ] . . . may be

---

79. See, e.g., *Sea Ranch Ass'n v. California Coastal Comm'n*, 527 F. Supp. 390 (N.D. Cal. 1981); *Whaler's Village Club v. California Coastal Comm'n*, 173 Cal. App. 3d 240, 254, 220 Cal. Rptr. 2, 9 (1985), *cert. denied*, 106 S. Ct. 1962 (1986).

80. U.S. CONST. amend. V. The fifth amendment has been incorporated to the states through the fourteenth amendment. *Chicago, Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226 (1897).

81. 458 U.S. 419 (1982).

82. *Id.* at 425 (emphasis added) (citation omitted).

83. Just compensation is normally based upon the fair market value of the property taken. *J. NOWAK, supra* note 68, at 494.

84. 438 U.S. 104 (1977).

85. *Id.* at 124.

86. *Id.*

87. *Id.* The Court, distinguishing between actual "physical invasion[s] by government," and interferences "aris[ing] from some public program adjusting the benefits and burdens of economic life to promote the common good," remarked that a taking would more likely be found in the prior case. *Id.*

characterized as [an] acquisition[ ] of resources to permit or facilitate [a] uniquely public function[ ] . . . ."<sup>88</sup>

#### A. Factor One: Interference with Investment-Backed Expectations

Beach-front property owners in California unquestionably pay some of the highest prices in the nation for their land.<sup>89</sup> Public access dedication requirements imposed by the Coastal Commission often cause a significant devaluation of these properties.<sup>90</sup> Thus, it may genuinely be said that such exactions constitute a significant interference with the "distinct investment-backed expectations" of these individuals.<sup>91</sup>

While one factor to be considered is the fact that the Commission exactions interfere with economic expectations, state interference alone does not normally provide sufficient grounds for finding a compensable taking. State regulations of land use which result in diminution of private property values have traditionally been upheld by the courts, so long as the landowner retains some beneficial use of the property.<sup>92</sup>

88. *Id.* at 128.

89. For example, vacant beach-front lots in Malibu, California range in value from \$175,000 to over \$5,000,000. The value per frontage foot ranges from \$6,000 to \$25,000 per foot. Improved land in the same area is valued in the range of \$350,000, on the low end, up to \$10,000,000 and more. Telephone interview with Jerry Pritchett, specialist in appraisal of Malibu coastal properties (Pritchett Realty Corp., 21355 Pacific Coast Hwy., Malibu, CA 90265, (213) 456-3692) (Jan. 30, 1987).

90. Mr. Jerry Pritchett of Pritchett Realty Corp. has devised a formula for estimating the average devaluation to private beach-front property that results from the imposition of a lateral public access easement across upland property by the Coastal Commission. The minimum devaluation to unimproved land is calculated to be 10% of the total value. Under this formula, a lot that has 40 frontage feet and a normal value of \$25,000 per frontage foot would be devalued by at least \$100,000 as a result of the Coastal Commission exaction. *See id.*

A more conservative estimate by another appraiser of the probable devaluation of the same lot is \$50,000, or 5%. Telephone interview with Donald Condit, real estate appraiser (Condit Appraisal Co., 2714 Pico Blvd., Santa Monica, CA, (213) 450-5882) (Jan. 23, 1987).

*See also* *Grupe v. California Coastal Comm'n*, 166 Cal. App. 3d 148, 156, 212 Cal. Rptr. 578, 582 (1985). In *Grupe*, the Commission exacted an area encompassing approximately 8,000 to 10,000 square feet, or approximately two-thirds of the total area of the landowner's beach-front property. No dollar value diminution was mentioned in the case.

91. *Penn Central*, 438 U.S. at 124.

92. *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980) (stating that where a land use regulation does not "prevent the best use of [the] land," it will be upheld despite the imposition of limitations on the landowner's use thereof). *See also Grupe*, 166 Cal. App. 3d at 156, 212 Cal. Rptr. at 582 (upholding Commission's exaction of two-thirds of landowner's property).



Contrary to the logic used by the California courts to uphold Coastal Commission exactions, the United States Supreme Court, in *Kaiser Aetna v. United States*,<sup>93</sup> recognized that the expectancy of the *right to exclude others* is a distinct investment-backed expectation. The Court held that government interference with this right would warrant a finding of a compensable taking.<sup>94</sup> It was observed that a taking of private property resulted when the government defeated the landowner's expectation of an exclusionary interest in a man-made marina. The marina was built so that it was connected to navigable waterways of the United States. Prior to the development the land had been a shallow pond that was private property under state law. The Court reasoned that since the government had granted prior consent to develop the pond into a marina, the developer's exclusionary expectation was reasonable and required the payment of just compensation if the government chose to exact the property for public use.<sup>95</sup> This holding was made in spite of the fact that federal law does not generally permit the recognition of exclusionary property rights in navigable waters.<sup>96</sup>

The importance the Court placed upon protecting a property owner's general right to exclude others in *Kaiser Aetna*, in which the disputed property was a navigable waterway, is highlighted by the willingness of the Court to find an exception to the law of federal navigational servitude. There is a general public right to interstate

---

93. 444 U.S. 164 (1979).

94. *Id.* at 179. Although the Court did not expressly refer to the right to exclude as an "investment-backed expectation," it may be readily inferred from the opinion that such an analysis was employed by the Court in reaching its conclusion.

First of all, in the recitation of the facts in *Kaiser Aetna*, Justice Rehnquist stated that the landowner "had invested millions of dollars in improving" the property. *Id.* at 169. He later noted that the extent to which government regulation interferes with a landowner's "reasonable investment-backed expectations" is one of the key factors identified by previous decisions in making the taking inquiry. *Id.* at 175.

The Court next recognized that although not all economic interests are property rights, there exist some "'economic advantage[s]' that ha[ve] the law back of [them] to such an extent that courts may 'compel others to . . . compensate for [their] invasion.'" *Id.* at 178.

It may therefore be concluded that where a landowner develops a reasonable investment-backed expectation in the right to exclude, that expectancy may not be defeated by the government absent payment of just compensation.

95. *Id.* at 179. The Court recognized that

[w]hile the consent of individual officials representing the United States cannot 'estop' the United States, it can lead to the fruition of a number of expectancies embodied in the concept of 'property'—expectancies that, if sufficiently important, the government must condemn and pay for before it takes over the management of the landowner's property.

*Id.* (citations omitted).

96. See *United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 69 (1913) (no private property interest can exist in waters that are navigable in their natural state). Note that the landowner in *Kaiser Aetna* had transformed a non-navigable pond into a navigable waterway. See *supra* notes 93-95 and accompanying text.

navigable waters which is recognized in order to keep open the highways of commerce.<sup>97</sup> Notwithstanding this rule, the *Kaiser Aetna* Court elevated the value of private property above the public interest in navigable waters in that case.

California courts have attempted to distinguish *Kaiser Aetna* from cases involving beach access exactions by the Coastal Commission.<sup>98</sup> It has been argued that since Coastal Commission exaction cases involve allegations of an exclusionary expectation with respect to public trust lands, the property owners may not reasonably possess an expectation of a right to exclude the public unless, as in *Kaiser Aetna*, prior governmental approval had been obtained.<sup>99</sup>

Under the public trust doctrine, the state, as an attribute of its sovereignty, is said to hold certain lands in fee simple for the public benefit. Thus, the state has the power and the obligation to manage these lands in a manner best suited to the public's needs.<sup>100</sup> In California, *tidelands* are included within the public trust.<sup>101</sup> Article 10, section 4 of the California Constitution provides the basis for their inclusion: "No individual . . . claiming or possessing the frontage or *tidal* lands of a . . . navigable water in this State[ ] shall be permitted to exclude the right of way to such water whenever it is required for any public purpose . . . ."<sup>102</sup>

However, there is no like basis to conclude that the *uplands*<sup>103</sup> were intended to fall within the trust. Although section 4 of article 10 also mentions "frontages" as being included, the term does not refer to the uplands. Records of the constitutional debates indicate that "frontages" was used interchangeably with "tidelands" at the California Constitutional Convention, from which article 10, section 4 emerged.<sup>104</sup>

---

97. *Chandler-Dunbar*, 229 U.S. at 69. the *Kaiser Aetna* court discussed the navigational servitude doctrine, but found the policy concerns of the rule to be outweighed by certain private property concerns. *Kaiser Aetna*, 444 U.S. at 175-78.

98. *Whaler's Village Club v. California Coastal Comm'n*, 173 Cal. App. 3d 240, 257, 220 Cal. Rptr. 2, 11 (1985), *cert. denied*, 106 S. Ct. 1962 (1986).

99. *See id.* at 257, 220 Cal. Rptr. at 12 (1985) (distinguished from *Kaiser Aetna* because "there was no prior governmental approval on which [the landowner] relied.").

100. *See Comment, Public Access and the California Coastal Commission: A Question of Overreaching*, 21 SANTA CLARA L. REV. 395, 404 (1981).

101. *Marks v. Whitney*, 6 Cal. 3d 251, 259, 491 P.2d 374, 380, 98 Cal. Rptr. 790, 796 (1971).

102. CAL. CONST. art. X, § 4 (emphasis added).

103. "Uplands" are those lands lying landward of the mean high tide line. *See supra* note 13 and accompanying text.

104. The following brief quote from the debate at the convention is exemplary: "Now, whether these rights exist for individuals or corporations makes no difference.

Several commentators have suggested that a latent right of public access across private uplands is concomitant to access rights across tidelands since, without the right to pass over the uplands, the public access right to tidelands is effectively defeated at high tide.<sup>105</sup> But California courts have refused to extend the public trust to uplands where interference with private property rights would result; thus, there is no basis for concluding that the uplands fall within the trust.<sup>106</sup> And since privately owned uplands are not included within the public trust, beach-front property owners may reasonably develop an expectation of a right to exclude the public from privately owned upland property even in the absence of prior governmental consent.

It follows that *Kaiser Aetna* may not be distinguished on the basis that the state has not given special consent to the exclusion of the public from private beach-front property. *Kaiser Aetna* instead mandates that when the California Coastal Commission exacts public access easements from these landowners, it interferes with their "distinct investment-backed expectations"<sup>107</sup> of excluding the public.<sup>108</sup> A taking, therefore, should be recognized.

#### B. Factor Two: The Character of the Governmental Action

The second *Penn Central* factor, when applied to Commission exaction cases, further suggests the presence of a taking for which compensation must be paid. The Court in *Penn Central* remarked that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government,

---

*These frontages are held in this state to the exclusion of lawful traffic across these tide lands to the salt water."* Comment, *supra* note 100, at 408 n.56 (quoting DEBATES AND PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 1438 (1880) (emphasis added)).

105. See Eikel & Williams, *The Public Trust Doctrine and the California Coastline*, 6 URB. LAW. 519, 565 (1974); Comment, *California Beach Access: The Mexican Law and the Public Trust*, 2 ECOLOGY L.Q. 571, 572 (1972); Comment, *Public Beach Access Exactions: Extending the Public Trust Doctrine to Vindicate Public Rights*, 28 UCLA L. REV. 1049, 1072-73 (1981).

106. The fact that uplands are not subject to the public trust doctrine is widely recognized. No cases were found in which the issue is litigated, but the decisions that distinguish uplands and tidelands do not dispute that the landowner can exercise his normal property rights in the uplands.

For example, in a 1930 decision the supreme court said, "It is recognized that the owner of land riparian to a navigable body of water has no right below the high-tide line as against the state . . . ." *City of Oakland v. E. K. Wood Lumber Co.*, 211 Cal. 16, 22, 292 P. 1076, 1079 (1930). By reverse implication, therefore, it is clear that the landowner's property rights do not stop until the mean high tide line is reached. See also *City of Los Angeles v. Venice Peninsula Properties*, 31 Cal. 3d 288, 642 P.2d 792, 182 Cal. Rptr. 599 (1982); *County of Orange v. Heim*, 30 Cal. App. 3d 694, 106 Cal. Rptr. 825 (1973).

107. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

108. *Kaiser Aetna v. United States*, 444 U.S. 164, 178-80 (1979).

than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."<sup>109</sup>

State zoning ordinances provide the classic example of the type of governmental regulation which does not result in a finding of a taking.<sup>110</sup> California courts have upheld the Commission's authority to require public access exactions without paying just compensation by analogizing this activity to valid exercises of state zoning power.<sup>111</sup> However, Commission access exactions can be distinguished from ordinary zoning ordinances, since the exactions entail the additional element of a physical invasion of private property by the public.<sup>112</sup>

The element of physical invasion has been regarded as particularly noxious in a recent United States Supreme Court decision. In *Loretto v. Teleprompter Manhattan CATV Corp.*,<sup>113</sup> the Court introduced a "bright line" test for determining when a taking will be recognized. Justice Marshall, writing for the Court, concluded "that a permanent physical occupation authorized by government is a taking without regard to the public interest that it may serve."<sup>114</sup> The Court's decision was apparently influenced by its recognition that a property owner "suffers a special kind of injury when a *stranger* directly invades and occupies [his] property."<sup>115</sup>

Coastal Commission beach access exactions involve dedications of limited duration, usually twenty-one years.<sup>116</sup> It is arguable that they should be excluded from the scope of the *Loretto* holding, which indicates that a permanent occupation is required. However, a physical occupation of a duration that is less than *ad infinitum* will satisfy the Court's permanency requirement.<sup>117</sup>

109. *Penn Central*, 438 U.S. at 124 (citation omitted).

110. *Id.* at 125.

111. See *Whaler's Village Club v. California Coastal Comm'n*, 173 Cal. App. 3d 240, 220 Cal. Rptr. 2 (1985), *cert. denied*, 106 S. Ct. 1962 (1986). "In an analogous setting [to the coastal access exaction fact situation involved in the case], the United States Supreme Court, as well as the California Supreme Court have held that a zoning ordinance may be 'unconstitutional and subject to invalidation . . .'" *Id.* at 258, 220 Cal. Rptr. at 12 (emphasis added).

112. The language of the dedications exacted generally includes extending to the public a right of "access" and to engage in "passive recreational use" of the upland area immediately fronting the landowner's residence. *Id.* at 249, 220 Cal. Rptr. at 6.

113. 458 U.S. 419 (1982).

114. *Id.* at 426.

115. *Id.* at 436 (emphasis in original).

116. See, e.g., *Whaler's Village*, 173 Cal. App. 3d at 263-64, 220 Cal. Rptr. at 16.

117. *Loretto* involved the installation of a cable TV wire and other hardware across a private landowner's rooftop. The Court maintained that since the installation was to

The *Loretto* majority seemed primarily concerned with distinguishing long-term invasions from those of very short duration, which “do not absolutely dispossess the owner of his rights to use, and exclude others from, his property.”<sup>118</sup> The Court cited *PruneYard Shopping Center v. Robins*<sup>119</sup> to exemplify the distinction.<sup>120</sup> In *PruneYard*, the Court found no taking occurred where the involved invasion lasted only for “a Saturday afternoon.”<sup>121</sup>

By contrast, the twenty-one year duration of Coastal Commission exactions results in a significant dispossession of property owners’ rights, thus falling squarely within the *Loretto* Court’s broad interpretation of the term “permanent.” It follows that a taking should be recognized in cases where the Coastal Commission exacts public access dedications from private beach-front property owners since a sufficiently “permanent physical occupation” authorized by the government is involved in those cases.

California courts, however, analyze the taking question based on more than a mere showing that the government’s interference amounts to a permanent physical intrusion. Which party acted first in “trigger[ing] the police power of the state”<sup>122</sup> is also considered. Where the state’s involvement was initiated by the state itself, a taking will be found;<sup>123</sup> but where the state waits until the landowner performs some triggering act, no taking is recognized in California.<sup>124</sup>

This is a distinction without a difference. It is irrelevant whether the state takes property outright or simply devises a scheme whereby land is taken as a condition to the grant of permission to use land, especially when the state knows that those uses will inevitably occur (e.g. new construction or improvements to maintain the value of the property). Whether the state characterizes its action as a taking or as a mere condition, it involuntarily deprives property owners of their land for public purposes.<sup>125</sup> The state’s power to regulate the devel-

---

remain “[s]o long as the property remain[ed] residential and [so long as] a CATV company wishe[d] to retain the installation,” the physical occupation satisfied the permanency requirement. *Loretto*, 458 U.S. at 439.

118. *Id.* at 435 n.12.

119. 447 U.S. 74 (1980).

120. *Loretto*, 458 U.S. at 434.

121. 447 U.S. at 77.

122. *Whaler’s Village Club v. California Coastal Comm’n* 173 (Cal. App. 3d 240, 257, 220 Cal. Rptr. 211 (1985), *cert. denied*, 106 S. Ct. 1962 (1986).

123. *See, e.g., United States v. Welch*, 217 U.S. 333 (1910) (flooding of private land).

124. Zoning cases provide the paramount example. Zoning is considered a noninitiatory government regulation which does not effect a taking so long as the restrictions imposed are reasonably related to the promotion of the public health, safety, and general welfare. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 125-27 (1978).

125. One author posits the following standard for determining the constitutionality of state attempts to impose such conditions:

[An assessment must be made of] the relative constitutional interests of the individual and the interests of the state in asserting X [which is the particular

opment of property should not be power to condition the landowner's right to develop his land upon forfeiture of just compensation.<sup>126</sup> The application of this dubious distinction can and has yielded unjust results.<sup>127</sup>

This distinction has been received with disapproval by the United States Supreme Court.<sup>128</sup> Furthermore, it certainly cannot govern in light of dicta in the *Loretto* case, which states that "a permanent physical occupation [by government] is a taking *without regard to other factors that a court might ordinarily examine*."<sup>129</sup> Thus, application of the landowner-initiated/state-initiated action rule is improper. A finding of a permanent physical occupation by the state,

---

constitutional right—here it is the fifth amendment right to just compensation for the taking of property] in the course of B [the non-constitutional right—here it is the interest in the land development], as measured by the constitutional standard that *ordinarily governs* the assertion and nonassertion of X in other settings.

Westen, *Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another*, 66 IOWA L. REV. 741, 749 (1981) (emphasis added).

It follows from this that an otherwise compensable intrusion onto an individual's property by a state cannot be made noncompensable by categorizing the deprivation as a mere attachment of a condition.

126. See Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960). The argument for the imposition of such conditions is as follows:

It is contended that if the government may withhold the benefit in the first instance, without giving a reason, it may withhold or revoke the benefit even though its reason for doing so may be the individual's refusal to surrender his constitutional rights. . . .

. . . . The potential erosion of fundamental liberties through the use of this bargaining technique has prompted the development of the doctrine of "unconstitutional conditions."

*Id.* at 1594-95. This doctrine generally declares that a state may not conditionally deprive an individual of a right which it was powerless to remove directly.

127. For example, in *Whaler's Village* landowners sought to construct a seawall to protect their property from potential destruction by ocean waves. The landowners were faced with the choice of either dedicating part of their property to the state for public access, or risking the loss of their entire premises to the ocean surf. *Whaler's Village Club v. California Coastal Comm'n*, 179 Cal. App. 3d 240, 220 Cal. Rptr. 2 (1985), *cert. denied*, 106 S. Ct. 1962 (1986).

The trial court judge in the case properly recognized the arbitrariness of the distinction based upon which party acted first. He remarked that "the condition requiring the homeowners to deed their entire private beach to the State or lose their homes to the sea constituted an unlawful taking . . ." *Id.* at 251, 220 Cal. Rptr. at 7. The decision of the trial court was reversed by the California Court of Appeal.

128. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The Court remarked that "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation. . . . The right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated." *Id.* at 439 n.17.

129. *Id.* at 432 (emphasis added).

without consideration of who initiated the state action, should be dispositive in analyzing whether Commission exactions result in a taking of private property for which just compensation must be paid.

*C. Factor Three: Whether the Acquisition is Intended to Facilitate a Uniquely Public Function*

The third factor announced by the *Penn Central* Court for determining whether a governmental act amounts to a taking of private property for public use is whether the government "appropriated part of [the] property for some strictly governmental purpose."<sup>130</sup> Justice Brennan, speaking for the majority, proffered two factors for determining whether this strictly governmental purpose, or uniquely public function, is involved: first, whether the government's action "exploits [the landowner's] parcel for city purposes"; and second, whether it "facilitates [or] arises from . . . entrepreneurial operations of the city."<sup>131</sup> While these factors may provide some guidelines for identifying a uniquely public function, their application is uncertain since the Court failed to explain their exact meaning.

For instance, any action taken by a state under the police power can be argued to be necessarily for state purposes, at least in a broad sense. After all, the purpose of government is to bestow benefits to the public. The Court similarly provided no explanation of when a governmental entity operates in an entrepreneurial capacity for purposes of takings analysis.<sup>132</sup>

The *Penn Central* Court did, however, offer *United States v. Causby*<sup>133</sup> as an example of a fact pattern involving a uniquely public function. In *Causby*, the Court found that frequent overflights by military aircraft above a landowner's chicken farm which destroyed the commercial value of the property constituted a taking.<sup>134</sup> Thus, it can be inferred from *Penn Central* that, at least where the government acts in furtherance of military goals, it satisfies the governmental purposes and entrepreneurial capacity criteria.<sup>135</sup>

---

130. *Penn Central*, 438 U.S. at 135.

131. *Id.*

132. Webster's Dictionary defines "entrepreneur" as "one who organizes and directs a business undertaking, assuming the risk for the sake of profit . . ." WEBSTER'S NEW UNIVERSAL UNABRIDGED DICTIONARY 608 (2d ed. 1983).

A governmental entity operates in an "entrepreneurial capacity" when it participates in an activity, such as that engaged in by the State of South Dakota in *Reeves v. Stake*, 447 U.S. 429 (1980) (state involved in the sale of cement to the public). However, the *Penn Central* Court's reference to *Causby* as a case involving a government entity acting in an enterprise capacity confuses this issue. See *infra* notes 133-35 and accompanying text.

133. 328 U.S. 256 (1946).

134. *Id.* at 259.

135. "Appellants . . . would have us treat the [land-use regulation involved in the case] as an instance, like that in *United States v. Causby*, in which government, acting

The reference to *Causby* only confuses the test for finding the existence of a uniquely public function in government action and, hence, whether the action should be characterized as a taking. Military activity intuitively does not readily comply with common notions of entrepreneurial activity by government. It is uncertain whether the entrepreneurial activity element should be considered on its face, or whether an analogy to the situation in *Causby* is also necessary. If the uniquely public function factor is considered only on its face, then there is little guidance for distinguishing those cases in which a regulation is in furtherance of a government entrepreneurial activity and when it is an exercise of police power. Thus, the third *Penn Central* factor is too obfuscated to be of any utility in predicting future Supreme Court cases.

## V. CONCLUSION

Under the police power, the Commission acts properly when it conditions approval of new development upon aesthetic factors. However, exactions from nonsubdividing landowners are arbitrary since the rationales normally justifying such action are absent. While Commission exactions of public access-easements in situations where the particular development directly contributes to the need for public access, as in a subdivision development, do not exceed police power, the police power of the State of California is exceeded where exactions are required of nonsubdividing landowners. In these situations, the power of eminent domain, which requires compensation for the land taken, is the proper vehicle for the state action.

The *Loretto* decision mandates that governmental interference with land use should be subjected to a takings analysis under the fifth amendment, despite a finding that a particular land regulation may be valid under the police power. Application of all three factors announced in *Penn Central* suggests that a compensable taking of private property for public use should be recognized in cases involving public-access exactions by the California Coastal Commission.

First, the imposed conditions significantly thwart reasonable investment-backed expectations in the right to exclude the public, which is a fundamental property right upheld in *Kaiser Aetna*. Second, the exactions involve a significant permanent physical occupation by the public, which was found to be particularly noxious in

---

in an enterprise capacity, has appropriated part of their property for some strictly governmental purpose." *Penn Central*, 438 U.S. at 136.



*Loretto*. Each of these factors has alone been found sufficient to support a finding of a compensable taking.<sup>136</sup> Although the proper application of the third *Penn Central* factor is uncertain, satisfaction of the first two factors should provide more than enough weight to warrant a finding that the Coastal Commission has exceeded the state's police power in requiring easements across private beach-front property.

For these reasons, the economic burden for the provision of public access easements to the California tidelands should properly be borne by the government through the collection of taxes from residents throughout the state, rather than by violating the constitutional rights of a few individuals. Justice Rehnquist's dissent in *Penn Central*, quoting Justice Holmes in *Pennsylvania Coal v. Mahon*, is as fitting now as ever:

Over 50 years ago, Mr. Justice Holmes, speaking for the Court, warned that the courts were 'in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.'<sup>137</sup>

Public access to the state's tidelands is unquestionably of great importance. If the California Coastal Commission determines the need for access to justify the imposition of public access easements, the state should be required to use the constitutional method of making the change through eminent domain. The few beach-front owners have a constitutional right to the payment of just compensation if they are to have their land taken for the benefit of the many.

MITCHELL F. DISNEY

---

136. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) (interference with the economic advantage inuring to the owner by virtue of his right to exclude others was sufficient to show a compensable taking); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 411 (1982) (permanent physical occupation dispositive).

137. *Penn Central*, 438 U.S. at 152 (Rehnquist, J., dissenting) (citing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922)).